U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: December 1, 1999

Case No.: 1997-INA-0498

In the Matter of:

Los Angeles United Investment Co. D/b/a St. Vincent Jewelry Center,
Employer,

on behalf of

Amal Al Hames,
Alien.

Appearance: Terenik Koujakian, Esq.
Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application filed by Los Angeles United Investment Co. d/b/a St. Vincent Jewelry Center on January 26, 1995, seeking labor certification for Amal Al Hames, Alien, for the position of Cook, Mess, Middle Eastern (AF 89). The duties of the job were described as follows:

> Prepares and cooks family-style Middle eastern meals for employees. Cooks foodstuffs in quantities according to number of persons to be served. Prepares sauces, dressings, puddings, or relishes to be served with dish. Portions and places food on plate, and arranges garnishes on plate. Washes dishes. Bakes breads and pastry. Plans menu taking advantage of foods in season and local availability. May serve meals. May order supplies and keep records and accounts.

Employer required that applicants have two years of experience in the job offered or two years of experience as a Middle Eastern Specialty Cook.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on May 29, 1996 (AF 82-87). The CO stated that the job description lists duties that do not appear in any single Dictionary of Occupational Titles (DOT) job description in violation of 20 C.F.R. § 656.21(b)(2)(ii); that portions of the job duties are included in the DOT job descriptions for Cook Specialty, Foreign Food (313.361-030), Cook, Cafeteria (313.131-018) and Cook, Pastry (313.381-026). The CO instructed Employer that it may revise the job duties to eliminate the combination of duties or justify the combination of duties or document that such employment is normal or customary.

The CO also questioned whether a current job opening exists to which U.S. workers could be referred, or whether there is a current existing business operated by Employer. The CO stated that Employer has not shown that the job duties described (lunch time cook) constitute full-time employment in the context of Employer's business which is a jewelry center. The CO noted that a photograph depicted an existing room with a table and eight chairs and asked how and where are the employees eating their lunches at the present time and why can't the current eating arrangement continue, and how do the customers know what food is available and the prices without a menu? The CO also noted that it appeared that the kitchen facilities are available to Employer's 25 employees on a self-serve basis. The CO instructed Employer to submit documentation, including the firm's business license, that would establish that there is an ongoing

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

business and that an unfilled job opening exists. The CO also requested evidence that would establish that the job as performed in Employer's business clearly constitutes full-time employment. The CO stated that Employer should provide documentation to substantiate all assertions made and that the evidence submitted must consist of data to support each assertion or conclusion and must include;

A.) The number of meals prepared daily and weekly; the length of time required to prepare the meals; the number of people for which such meals are prepared.

B.) List each of the duties of the position, including cooking, and the frequency of performance of each duty.

C.) What are the daily/weekly work schedules of those who utilize the cooking facility.

D.) How is the exchange of money being handled by the operation? Provide information to document that lunches are being sold.

E.) Provide information to document that food is being purchased by Employer.

The CO also stated that the two year experience requirement is not normally required for the offered job and is therefore unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2)(i)(A). The CO instructed Employer on the appropriate corrective actions.

Employer, by counsel, submitted rebuttal on June 24, 1996 (AF 14-81). Counsel stated that all the job duties but one are included in the DOT job description for a Cook, Mess (315.361-010). Counsel, requested that the title of the offered job be changed to Cook, Mess. Counsel also stated that a cook who can prepare Middle Eastern style foods is required because all of the partners and over 50 percent of the remaining staff are of Middle Eastern origin.

Counsel submitted a copy of Employer's business license and a fictitious name statement indicating that a general partnership, LAUIC, does business as St. Vincent Jewelry Center. Counsel stated that LAUIC manages a building in Los Angeles for 410 tenants; that it employs a general manager, a building manager, a leasing manager, an accountant, a bookkeeper, an administrative assistant, a secretary, fifteen maintenance workers, a night guard, a cook and eight security guards. Counsel stated that Employer's gross income exceeds four million dollars per year and provided Employer's Federal tax I.D. number.

Counsel also responded to specific question from the CO, stating that the employees eat in Employer's lunch room; that the food is prepared by a full-time cook who wishes to quit as soon as the Alien is certified; that the total seating in the lunch room exceeds 15 when seating on the couches is considered; that the kitchen facilities are made available to employees on a self-serve basis; that there is no choice of food and there is no charge for food. Counsel also stated that one meal is prepared daily, that it takes three to four hours to prepare the meal and that an average of twenty employees eat in the lunch room every day. Counsel also stated that the food is purchased by the cook from petty cash. Included with rebuttal were a Fictitious Business Name Statement

(AF 28-32), Employer's tax identification number (AF 33) a City Tax Registration Certificate (AF 34), Employer's Quarterly Federal Tax Return (AF 35), numerous receipts for food purchased during the first six months of 1996 (AF 36-62) and a copy of a St. Vincent Jewelry Center Booth Lease (AF 63-81).

The CO issued a Final Determination denying certification on September 11, 1996 (AF 12). The CO accepted portions of the rebuttal, but stated that Employer had failed to provide documentation to support its allegations that the current cook wishes to quit as soon as the Alien is hired, that the meals are complimentary and that employees utilize the lunch room. The CO also stated that Employer's listed job duties are duplicative and not supported with documentation; that due to the lack of specificity as to the length of time it takes to prepare and serve meals and wash dishes, Employer's assertions have little or no value.

The CO also stated that Employer provided no documentation to support its assertions concerning the weekly duties of planning the menu, ordering supplies and keeping records, without which these assertions lack credibility. The CO also found a lack of credibility in Employer's assertion that food for the lunches was purchased from petty cash. The CO stated that it is not believable that a business the size of Employers would provide twenty free meals per day to employees and not monitor and itemize the expenses. The CO also stated that the food receipts do not identify who and for what the food was purchased and that some of the receipts are from restaurants and reflect the payment of tips for service. The CO concluded that Employer had failed to document that a current job opening exists to which a U.S. worker could be referred; that there is nothing to indicate that this is a bonafide job opening.

DISCUSSION

The issue is whether Employer's evidence established that a current job opening exists to which U.S. workers can be referred.

When an employer requests labor certification for an Alien, 20 C.F.R. § 656.20(c)(8) requires that it must establish that a bonafide job opportunity exists to which U.S. workers can be referred. See, *Pasadena Typewriter and Adding Machine Co., Inc and Alirez Rahmety v.U.S. Dept of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). The Employer has the burden of proving by clear and convincing evidence that a valid employment relationship exists and that a bonafide job opportunity, to which U.S. workers can be referred, is being offered. *Amger Corp.*, 87-INA-337 (Jan. 4, 1990)(*en banc*). This Board has held that a totality of circumstances test shall be applied to determine if a job opportunity is bonafide. *See, Carlos Uy III*, 1997-INA-304 (Mar. 3, 1997)(*en banc*).

Employer contends that it wishes to hire a full-time cook to replace the current cook who wishes to quit as soon as the Alien is certified. However, there is no documentation that the cook duties are currently being performed as stated in the labor certification application or that the cook wants to leave the job. Nor is there any indication of why the cook wants to leave or where he will work in the future. He may be rotating into another job in the company to make room for the Alien who, like the owners and majority of employees, is of Middle Eastern origin. None of the circumstances have been explained or documented. There is also no creditable documentation

that an average of twenty free meals per day are prepared and served to employees. Moreover, it is not believable that Employer spends thousands of dollars per year on meals for employees and does not itemize or record the actual expenses incurred. Obviously, if incurred, the cost of these meals would constitute a substantial business expense and tax deduction. In addition, receipts for food purchases do not identify Employer as the purchaser and many of the them are for just a few items, such as two cinnamon rolls and two drinks for $5.70 (AF 38), five 7-Ups and five Cokes for $7.00, plus a tip of $1.00 for service (AF 49) and $1.99 for jumbo eggs (AF 55). Many of the receipts do not identify what was purchased or from whom the purchases were made. (AF 42, 45, 46, 48, 50, 53, 56)

Employer has the burden of proof in this case and must convincingly establish that the granting of labor certification is appropriate under applicable law. Employer's failure to provide convincing documentation in response to the NOF supports the CO's determination that the job offer has not been shown to be a bonafide job offer to which U.S. workers could be referred. *Glencorp*, 87-INA-659 (Jan 13, 1988) (*en banc*).

ORDER

The Certifying Officer's denial of Labor certification is hereby **AFFIRMED**.
For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.